ants in possession that "you will find the defendants" guilty under Count 1, and if the jury found defendants had possession and did not explain that possession came to them legally "you would be authorized" to find the defendants guilty under Count 2 (R. 205-206). The Court below made the same error in finding that these instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment."

Possession is not a necessary element of either of the substantive crimes which the two statutes define and the presumptions are merely statutory rules of evidence. The statutes here involved do not make it a crime to possess the narcotics but rather make it unlawful to purchase, sell, or distribute the narcotics, or, on the other hand, to receive and conceal the drug knowing that it has been imported into the United States contrary to law. The statutory presumptions raised by possession deal with the facts necessary to find a substantive offense, and do not define the substantive offenses themselves. The presumptions involved in these two statutes are mere rules of evidence dealing with the proof of the required facts necessary to a guilty verdict rather than actually finding such offenses.[7]

The trial court further instructed the jury that they could find all of the defendants guilty if they found "either of them" had possession. Such instructions were particularly prejudicial since petitioner's defense was to the effect that he had not been in the premises where the narcotics were found. Under these instructions, the jury could have convicted petitioner even if it believed all of his evidence.

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[7] *Roviaro v. United States,* 353 U. S. 53; *United States v. Brown,* 7 Cir., 207 F. (2d) 310.

3. The instructions did not require the finding of an additional fact in one count which the other did not have. In the absence of such a finding, cumulative sentences should not have been imposed. The jury was merely told to convict if they found possession of heroin in accordance with the statutory presumptions. But the jury was not specifically required to find the elements distinguishing the two offenses charged. At no point in the instructions did the Court inform the jury to find the additional fact or facts in one count which the other count did not contain, and which fact or facts constituted the basis for the indictment charging two separate offenses. Rather did the Court permit this finding of the sole element of possession to be the basis for a verdict of guilty on both counts of the indictment. While an instruction which rests on a presumption may be legally sufficient if it requires the jury to merely find the presumption, yet the failure to require the finding of an additional fact where both counts rest on substantially similar presumptions reduces the test in the **Blockberger** case to mere form. A cumulative sentence in a criminal case should not rest on such an equivocal charge to the jury on the main or basic issue.[8]

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

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[8] Cf. *Bollenbach v. United States*, 326 U. S. 607.

## APPENDIX.

### OPINION.

UNITED STATES COURT OF APPEALS
for the Eighth Circuit.

No. 15,573.

Nathaniel Harris, Appellant,
v.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

(October 2, 1957.)

Sidney M. Glazer (Morris A. Shenker and Bernard J. Mellman were with him on the brief) for Appellant.

Robert C. Tucker, Assistant United States Attorney (Harry Richards, United States Attorney, and Robert E. Brauer, Assistant United States Attorney, were with him on the brief) for Appellee.

Before Sanborn, Woodrough, and Van Oosterhout, Circuit Judges.

Woodrough, Circuit Judge.

The appellant Nathaniel Harris was indicted together with Gladys Stamps and Clarence Robinson in two counts

for (1) purchasing 224 grains of the narcotic drug heroin other than in or from the original stamped package in violation of Sec. 4704 (a), Title 26, United States Code[1] and (2) for receiving and concealing the heroin knowing that it had been imported contrary to law, in violation of Sec. 174, Title 21, United States Code.[2]

The evidence on the jury trial tended to show that two St. Louis policemen, Nathaniel Robinson, Jr., and Robert Foxworth, on duty as beat policemen at about two o'clock of the morning of February 8, 1956, went to the intersection of Page Boulevard and Taylor Avenue in St. Louis where they had a meeting with someone to get informa-

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[1] Sec. 4704 (a) Packages.

(a) General requirement. It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Sec. 7237. Violation of laws relating to narcotic drugs and to marihuana.

(a) Violation of law relating to opium and coca leaves and marihuana. . . . whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years.

[2] Section 174 provides in part: Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any way facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third offense or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.

tion, then went to a certain four room apartment house at 4567 McMillan. They approached the house through the alley towards a lighted room on the ground floor. The house had two windows facing south. Officer Robinson stood on a can and looked into the room through a gap an inch and a half wide between the shade and the sill of one of the windows. Foxworth stood on a grating and looked into the room through a similar view space in the other window. Officer Foxworth saw Appellant Harris in the room, was close enough to him to reach him, and was positive of his identification. According to Foxworth, Harris was looking at something he was holding in his left hand and over which he made a motion with his right hand. Officer Robinson did not see Harris but he saw defendant Gladys Stamps in the room standing alongside Robinson, who was seated next to a bed on which there was some powder piled on a mirror. Robinson had his hand in the white powder on the bed. After short observation through the windows the officers entered the room together, but the inmates became aware of their approach and got out of the windows and ran away before the entry of the officers, leaving behind the powder on the mirror, some filled capsules, a box of empty capsules, some eye droppers with needles attached and a flour sifter. There were also capsules in a coat in the room. It was shown that the powder on the mirror was 42 grains of heroin and that there were 169 capsules filled with heroin. The heroin and paraphernalia were identified and put in evidence before the jury.

Bernard A. Theisen, Jr., a narcotic agent employed in the St. Louis office, testified for the government that he had talked to the defendants Robinson and Stamps in the jail about two months after the occurrence at 4567 McMillan and each of them told him that the three defendants had been in the room (as claimed by the government) and that the heroin belonged to appellant Harris.

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The defendant Robinson did not take the stand, but on the trial Harris and Stamps testified that Harris was not present in the room at 4567 McMillan on the night of the raid. Stamps testified that the third person in the room at the time in question was one Gola Mason. Gola Mason was called as a witness and corroborated Stamps' testimony. He swore positively that he was present, saw the powder and paraphernalia and that Harris was not there. He said he ran away with the others on the approach of the officers.

Grace Draper, a witness for Harris, testified that on the night in question she had just returned to her home at 1259 Aubert Street from the hospital where she had had a baby. Harris was the father of her baby and had not seen it. He came to her house between 11:00 and 11:30 on that night and left early in the morning at about six o'clock. She said that Gola Mason, who was a cousin of Harris, also came to the house and made statements in her hearing indicating that he had been at the scene of the police raid. All of the defendants were convicted on both counts and Harris was sentenced to an aggregate term of 10 years imprisonment and a fine of one dollar.

Harris appeals and contends for reversal:

(1) that the evidence was insufficient to support the verdict; (2) that hearsay evidence which was very prejudicial to him was erroneously received; (3) that the court erred in instructing the jury and (4) that the court erred in imposing cumulative sentences against him.

1. Examination of the evidence convinces that there was competent and material evidence that Harris was present with the other defendants in the room at 4567 McMillan where unstamped heroin was being handled, that Harris was "shown to have had possession of it," and to be a "person in whose possession it was found" within the

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. .....

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Eighth Circuit.**

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled cause on October 2, 1957.

### OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 13-22.

### JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1957 (Appendix, infra, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. A., § 1254 (1).

had made to Theisen were hearsay against Harris. But he was represented by counsel of his choosing, whose competency is not questioned, and may well have purposely determined to waive hearsay objection and let the statements be received in order to get the benefit of Stamps' testimony supporting his claimed alibi. In view of the apparent waiver of the hearsay objection it must be held that the court did not commit reversible error in receiving the testimony of Theisen in evidence or in not giving to the jury an explanation that was not requested, of the legalistic aspects in which the testimony should be disregarded as hearsay.

Discussion of such rulings or instructions for one in a position like that in which Harris stood on the trial of this case is found in the dissenting opinion of four members of the Supreme Court in **Delli Paoli v. United States**, 352 U. S. 246. Citing **Nash v. United States**, 54 F. 2d 1006, 1007.

3. The instructions given by the court are attacked here on the ground that they permitted the jury to convict Harris if they found that he had the described heroin in his possession without requiring them to find as a fact as to the first count that he purchased the heroin and as to the second count that he did receive and conceal it knowing that it had been imported into the United States contrary to law. But the court read to the jury the provisions of Title 26, United States Code, Sec. 4704 (a), Title 21, United States Code, Sec. 174, and the indictment charging defendants with violation thereof and the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation [26 United States Code, Sec 4704 (a)] and by which such possession "shall be deemed sufficient to authorize conviction unless defendant explains the possession to the satisfaction of the jury" (21 United States Code, Sec. 174). The jury was suffi-

## QUESTIONS PRESENTED.

(1) Whether in a prosecution for purchasing a narcotic drug other than from the original stamped package and for receiving and concealing this drug knowing that it had been imported contrary to law, a defendant may be doubly punished from a jury finding of the single fact of possession of narcotics when by statute these two offenses may be presumed from that fact and the presumption applicable to one offense presumes the existence of a fact not essential to the other.

(2) Whether it is sufficient to instruct the jury in a two count narcotic prosecution in which the government relies on two statutory presumptions which flow from the single act of possession to merely find possession in defendants, or either of them, rather than the elements of the two crimes charged.

(3) Whether in a two count narcotic prosecution double punishment may be imposed when the court fails to instruct the jury to find the additional facts distinguishing the crime charged in one count from the crime charged in the other count and merely requires them to find the single fact of possession of narcotics.

## STATUTES INVOLVED.

Section 2 (c) of the Narcotic Drugs Import and Export Act, 35 Stat. 614 (U. S. C., Title 21, Sec. 174), as amended by the act of Nov. 2, 1951, 65 Stat. 767, read as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years.

For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.[1]

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Section 4704 of the Internal Revenue Code of 1954 provided in part:

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Section 7237 of the Internal Revenue Code of 1954 provided in part:

(a) Violation of law relating to opium and coca leaves and marijuana.—Whoever commits an offense or conspires to commit an offense described in part I

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[1] By the Act of July 18, 1956, c. 629, Title I, §§ 103 and 105, 70 Stat. 568, 570, the maximum penalties were increased to twenty years for a first offender and to forty years for a second or subsequent offense both under this statute and under Section 7237 of the Internal Revenue Code of 1954.

or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years.

For a second offense the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. • • •

## STATEMENT.

Petitioner was convicted with two others by a jury under a two count indictment which charged them (1) with purchasing 224 grains of the narcotic drug, heroin, other than in or from the original stamped package in violation of Section 4704 (a), Title 26, U. S. Code, and (2) with receiving and concealing the same heroin knowing that it had been imported contrary to law in violation of Section 174, Title 21, U. S. Code. The maximum sentence of five years imprisonment for a first offender was imposed on each count to run consecutively making an aggregate sentence of ten years.

The evidence on the jury trial showed that on February 8, 1956, two St. Louis police officers stood on a can and on a grating and looked through a gap between the shade and sill of two windows of a house, that one officer saw petitioner in the room (R. 66-72) and the other saw his two co-defendants, Gladys Stamps and Clarence Robinson (R. 27-32). Robinson had his hand in some white powder on the bed. The individuals in the room fled before the entry of the officers and left behind some powder on the mirror, some filled capsules, a box of empty capsules, an eyedropper with needles attached and a flour sifter. The powder on the mirror contained 42 grains of heroin and there were 169 capsules filled with heroin (R. 37, 73).

A narcotic agent testified that he talked to defendants Robinson and Stamps in the jail two months after the occurrence and each of them told him that all three defendants, including petitioner, had been in the room and that the heroin belonged to petitioner (R. 114-120).

At the trial petitioner and Stamps both testified that petitioner was not present in this room (R. 146). Stamps testified that the third person in the room was one Gola Mason (R. 125), who when called as a witness admitted he was present and that petitioner was not there (R. 153-154).

The trial court in its instructions read to the jury the provisions of Section 4704 (a) of Title 26 and Section 174 of Title 21, United States Code, including the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation of 26 U. S. C., § 4704 (a), and the provisions by which such possession shall be deemed sufficient to authorize conviction unless defendant explains the possession to the satisfaction of the jury under 21 U. S. C., § 174. The indictment was also read (R. 197-200).

The Court then instructed the jury (R. 200):

> "So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence" (R. 200).

The trial court further charged as follows (R. 205-207):

> "So, if you find and believe from all the evidence beyond a reasonable doubt, that the defendants or either of them possessed the narcotics mentioned in Count 1, and that the said narcotics did not bear the required Internal Revenue tax stamps, then you will find the defendants or either of them guilty as charged in

Count 1. * * * Now, the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction as used in the statute, is meant that if the defendants, or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without the explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statutes which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient that the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan. The Court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2."

The Court below affirmed the conviction and held that the single fact of possession justified two cumulative sentences. It rejected petitioners' argument that since the conviction on both counts rested upon statutory presumptions and not upon independent evidence, a cumulative

sentence based solely on the presumptions flowing from the single act constituted double punishment. The Court found that the instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment."

Petitioner's contention that no double punishment could be imposed in the absence of instructions requiring the jury to find the additional facts distinguishing the counts was answered with the statement that "the instructions fully and accurately covered the applicable provisions of the section of the statutes and clearly defined the conditions for conviction."

## REASONS FOR GRANTING THE WRIT.

1. **Blockberger v. United States**, 284 U. S. 299, sets forth the rule that a defendant may be convicted of two separate offenses arising from a single act if each offense requires proof of a fact not essential to the other. This case goes further and in effect holds that a defendant may be convicted of two separate offenses and given double punishment from the proof of a single fact if two offenses may be presumed from that fact and the presumption applicable to one offense presumes the existence of a fact not essential to the other.

The single act of possession of narcotics does not violate any statute[2] but the different statutory presumptions which flow from this single act are deemed sufficient to establish the proof of a fact in one offense not essential to the other offense. Here petitioner was given the maximum sentence of imprisonment on each of two counts to run consecutively after the government proved a single fact,

[2] These statutory presumptions do not reduce the offense to one of mere possession. *Roviaro v. United States*, 353 U. S. 53.

the possession of narcotics, because 26 U. S. C., § 4704, and 21 U. S. C., § 174, establish two different presumptions which flow from this single act. 26 U. S. C., § 4704, makes it an offense to purchase a narcotic drug other than from the original stamped package and provides that the absence of tax paid stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." 21 U. S. C., § 174, inter alia, makes it an offense to receive and conceal a narcotic drug knowing that it has been imported contrary to law and provides that whenever "the defendant is shown to have or to have had possession of narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The court below in upholding petitioner's double punishment applied the following test:

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other."

The error in the application of that test in this case is apparent. The Court below reduced the offenses charged to that of mere possession and then in effect held that the single act of possession of narcotics violates two statutes even though this single act does not violate any statute. Possession gives rise to two presumptions but these statutory presumptions do not reduce the offense to one of mere possession. Moreover, the two offenses here involved became identical when at the trial no evidence was introduced of any additional fact distinguishing them. The same evidence, possession, did in fact sustain both charges. While one of the offenses required an element of proof

which the other did not, that requirement was eliminated by the use of the two statutory presumptions.

The cases relied upon by the Court below do not answer the issue raised herein. We concede that the two sections involved create separate offenses. But when the issue is raised after a guilty plea, there has been an admission of all facts averred in the indictment and reliance on the presumptions is not involved.[3] And cases which have considered related issues in a motion to vacate under Section 2255 of Title 28[4] are limited to matters which may be raised by collateral attack. In other cases, additional facts distinguishing the offenses involved had been introduced in evidence.[5] The evidence, in the instant case, shows that the government rested its case on the two statutory presumptions and did not introduce any additional fact distinguishing the two offenses. The result of the decision of the Court below is to dispense with the different evidential requirements of the two statutes here involved and to make them the same.

Moreover, it may be that the Boggs Act which sets forth the penalties applicable in this case would forbid the imposition of cumulative sentence.

> "The purpose of the bill (The Boggs Act) is to make more stringent **and more uniform** the penalties which would be imposed upon persons violating the Federal narcotic and marijuana laws." (Emphasis ours.) S. Rep. No. 1051, 82d Cong., 1st Sess., Oct. 1, 1951, 2 U. S. Code. Cong. Serv. 2602 (1951).

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[3] E. g. *United States v. Brown*, 7 Cir., 207 F. (2d) 310; *Torres Martinez v. United States*, 1 Cir., 220 F. (2d) 740.

[4] E. g. *Gore v. United States*, D. C. Cir., 224 F. (2d) 763; *United States v. Brisbane*, 3 Cir., 239 F. (2d) 859.

[5] E. g. *Sorrentino v. United States*, 9 Cir., 163 F. (2d) 627; *Bruno v. United States*, 9 Cir., 164 F. (2d) 693; *Copperthwaite v. United States*, 6 Cir., 37 F. (2d) 846.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957

No. 11

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

## REPLY BRIEF FOR PETITIONER.

MORRIS A. SHENKER,
BERNARD J. MELLMAN,
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

meaning of the sections of the statute on which the indictment was rested. It is fairly inferable from the picture presented by the evidence and the jury could well have concluded that defendants gathered in the room about their pile of heroin with the filled and unfilled capsules and paraphernalia for filling capsules and taking heroin, were engaged, as the government claimed, "in what is called in the vernacular of the business, 'capping up' heroin." The jury was not obliged to credit the evidence offered by Harris to establish an alibi.

2. Appellant contends the court erred in permitting the government witness Theisen to testify to hearsay statements made to him by the codefendants Gladys Stamps and Clarence Robinson. Theisen's testimony was that both Gladys Stamps and Clarence Robinson told him at the jail, nearly two months after the occurrence in question, that Harris was the owner of the heroin that was seized and was present in the room when and where the defendants had it. It is not seriously disputed that viewed from certain angles that testimony was hearsay. As to defendants Gladys Stamps and Clarence Robinson it was not hearsay but constituted a confession of guilt on their part and a description of their crime that was plainly admissible against each of them. The position of Gladys Stamps was different from that of Robinson because Gladys Stamps became a witness for Harris on the trial and gave testimony in support of his alibi. She swore that Harris was not in the room with her and Robinson or in possession of the heroin. Her contradictory statements to Theisen that Harris was in the room with her and Robinson, that the heroin belonged to Harris, and that he was the person from whom she (a confirmed narcotic addict) "copped" were also plainly admissible against her. Robinson did not take the witness stand.

Appellant Harris did not raise the objection on the trial that the statements Gladys Stamps and Robinson

ciently and correctly instructed of what it was necessary for them to find from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment.

4. Under his fourth point the appellant contends that the court erred in imposing cumulative sentences in respect to the two counts.

The record shows that on the return of the verdict in this case finding the defendant guilty on each of the two counts of the indictment, the court prescribed imprisonment for a period of five years as to and under the charge contained in count one and for a period of five years as to and under the charge contained in count two, the second term to run consecutively with the term imposed under count one. The court also declared concerning the two prescribed periods of imprisonment that they made "an aggregate term of imprisonment imposed herein upon defendant Harris of ten years."

This appeal was submitted at the May term in this year and on that submission a mistake was made as to the maximum penalty prescribed for the offense alleged in the second count and denounced in Title 21, United States Code, Sec. 174. Title 21, United States Code, Sec. 174, shows the maximum imprisonment for violation of that section to be ten years but the offense was committed as stated on February 8, 1956, and by amendment the maximum period of imprisonment made applicable for first offense under the section committed at that time is five years.

Accordingly on the submission of the case at the May term, the court did not find it necessary to pass upon appellant's contention that the trial court erred in imposing cumulative sentences of five years upon each of the two counts in the indictment to run consecutively. The sen-

tence to ten years imprisonment was considered as an aggregate sentence as declared by the trial court and as such was within the statutory maximum. When the amendment of the statute was called to our attention a rehearing was had and the question as to the periods of imprisonment imposed upon appellant was again presented and has been reconsidered.

The argument for appellant is in substance that the evidence showed only the single fact against him, that he had possession of the heroin, and nothing more and even if that fact was "prima facie evidence of a violation" and "authorized conviction * * * unless" [explained] the single fact could not justify two cumulative sentences.

If the question thus presented was of first impression it might be conceded that more than one answer would be possible, but the same question has often been considered by the federal courts and it is settled by unanimous and uniform decisions that separate and consecutive sentences for violation of the statutes here involved or their predecessors may be imposed, notwithstanding each offense arose from one common transaction. The latest case is **Gore v. United States,** 244 F. 2d 763, which was decided by the court of appeals of the District of Columbia April 25, 1957, after the judgment herein was rendered on April 27, 1956.

In that case the defendant had been indicted in six counts respecting two sales of narcotics in violation of Title 21, United States Code, Sec. 174 and Title 26, United States Code, Sec. 4704 (a) and Sec. 4705 (a) and after trial and conviction he had been sentenced to fine and imprisonment for from one to five years on each of the first three counts, the sentences to run consecutively. Similar sentences were imposed upon the last three counts to run concurrently with the first. Defendant subsequently moved

for vacation or modification of the sentences under Title 28, United States Code, Sec. 2255 and his motion was denied. On the appeal taken from the denial the court of appeals of the District of Columbia reviewed the decisions on the question of cumulative sentences under the narcotic acts in its own and other circuits. It quoted from **Kendrick v. United States**, 99 U. S. App. D. C. 173, 238 F. 2d 34 (1956) as follows:

> "A single act which violates two statutes is punishable under both, unless the offenses defined therein are identical. The test of identity is whether the same evidence will sustain both charges. If one of the offenses requires an element of proof which the other does not, a conviction of one does not bar prosecution for the other." Id., 238 F. 2d at page 36.

and declared:

> "When Congress enacted 26 U. S. C. §§ 4704 (a) and 4705 (a), and 21 U. S. C. A. § 174, it created three separate offenses. Each involves a different facet of the narcotics trade and each has different evidentiary requirements. This court and courts of a number of the other circuits, including the First, Fifth, Sixth, Seventh, Eighth and Ninth, have approved convictions and separate and consecutive sentences for violation of the same statutes involved here, or their predecessors, where each offense arose from one common transaction. And, as recently as January 2, 1956, the Third Circuit, in a well reasoned opinion by Judge Maris, in **United States v. Brisbane**, 239 F. 2d 859, a case identical to the present one, reached the same conclusion." 244 F. 2d 763, 765.

The decision in the Gore case is in accord with the decision of this court in **McIntosh v. White**, 21 F. 2d 934 (1927) and we are in accord with the Gore decision as presenting the law applicable to the question here involved brought

up to the present. The imposition of separate and cumulative sentences herein of five years under each of the two counts of the indictment was not erroneous.

Appellant has also argued that the instructions to the jury were erroneous in that the court did not require the jury to find specifically that defendant had done the acts charged in the two counts of the indictment in order to convict, but the instructions fully and accurately covered the applicable provisions of the sections of the statutes and clearly defined the conditions for conviction. They were not excepted to and were without error.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

**Judgment.**

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,573 September Term, 1957.

Wednesday, October 2, 1957.

Nathaniel Harris,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the District Court, Nathaniel Harris, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

October 2, 1957.